

949244

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Kelly D. Brown
Shareholder

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— & —
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A PROFESSIONAL CORPORATION
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SINCE 1912

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FIVE HOUSTON CENTER
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HOUSTON, TEXAS 77010-4035

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949244

August 13, 2018

Sparsh Khandeshi
Trial Attorney
U.S. Department of Justice
Environmental Enforcement Section
P.O. Box 7611
Washington, DC 20044

***CERTIFIED MAIL/RRR &
Via email: sparsh.khandeshi@usdoj.gov***

Re: United States' Claim against IZI for Past and Future Response Costs for the Sandoval Zinc Superfund Site in Sandoval, Illinois

Dear Mr. or Ms. Khandeshi:

By this letter, Interamerican Zinc, Inc. ("**IZI**") rejects the claim of the United States for past and future response costs for the Sandoval Zinc Superfund Site in Sandoval, Illinois (the "**Site**") as set forth in your July 19, 2018 letter to IZI.

In addition to the formal rejection, this letter responds to some of the statements in your letter of July 19, 2018, although this letter should not be interpreted as necessarily setting out all of IZI's arguments in this matter, and IZI reserves all rights.

IZI has no liability regarding the Site, to the United States or to any other person or entity, because IZI did not arrange for disposal of any materials at the Site, nor take any other action that would incur liability under CERCLA or other state or federal law. In support of IZI not being an arranger, the facts indicate that IZI had no relationship to the Site, except to sell valuable products to the Site operator for use in that entity's operation. Records establish that IZI's sales were legitimate and they confirm substantial amounts paid to IZI for those valuable products (See attached examples). IZI had no involvement with the operation at the Site, and certainly no role in any disposal decision.

The United States Supreme Court has established that sales do not provide the basis of arranger liability. *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 610 (2009) ("**BNSF**"), In *BNSF*, an agricultural chemical business, Brown & Bryant Inc. ("**B&B**"), operated a chemical storage facility adjacent to land owned by two railroads. As part of this storage business, B&B contracted with Shell for bulk shipping of pesticides, including the pesticide D-D, which

spilled during delivery and contaminated the adjacent parcel of land owned by the railroads. The Court found that Shell, as the manufacturer of agricultural chemicals that sold those chemicals to B&B was not liable as an “arranger” of the disposal of the chemicals, under CERCLA, for soil and water contamination at facility site. The Court first established that an entity cannot be held liable as an arranger for merely selling a useful product. Second, the Court found that, even though Shell ***was aware*** that some accidental spills or other disposal occurred during the transfer of chemicals from the common carrier to the facility’s storage tanks after the product had come under the facility’s stewardship, that was not sufficient to make Shell an arranger under CERCLA. In other words, awareness of the possibility of some disposal by the facility operator is insufficient to prove that an entity arranged for the disposal.

Cases since *BNSF* further support IZI’s position. For example, in *Consolidation Coal Co. v. Ga. Power Co.*, 781 F.3d 129, 153-54 (4th Cir. 2015) the Court held that procedures for offloading transformers that referred to “scrapping,” and even to “disposal,” did not indicate secondary motive for transformer sales to dispose of polychlorinated biphenyls (PCBs), and thus even these characterizations were not sufficient to create arranger liability under CERCLA. As in *Consolidation Coal*, IZI had no control over what the buyer did with the products that it purchased. As another example, in *Team Enterprises, LLC v. Western Investment Real Estate Trust*, 647 F.3d 901, 910-11 (9th Cir. 2011) the Ninth Circuit found that actions taken with the mere knowledge of future disposal were not enough to show intent to dispose. The Ninth Circuit, interpreting *BNSF*, asserted that, “[w]hile actions taken with the intent to dispose of a hazardous substance are sufficient for arranger liability, actions taken with the mere knowledge of such future disposal are not.”

In line with this reasoning, the 7th Circuit has stated that a carbonless copy paper manufacturer was not subject to arranger liability under CERCLA based on its corporate predecessor’s sale of broke to recycling mills, where the predecessor invested significant resources in recapturing broke, broke was valuable input for recycling mills, and the predecessor had no role in the mill’s disposal decisions. *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 705-07 (7th Cir. 2014). Companies that place materials into a competitive market and receive value that recoups some of the costs of production at the seller’s operation do not incur CERCLA liability. *Id.* at 705. Moreover, a seller’s indifference to the fact that use of the product could cause releases into the environment is insufficient to prove arranger liability. *Id.* at 706.

In summary, *BNSF* and cases applying it have consistently determined that sales of valuable products do not give rise to CERCLA liability; the United States has no basis to allege “arranger” or other liability as to IZI related to the Site.

Your statements regarding the role of state dissolution proceedings are also not accurate. Proceedings such as IZI’s current Delaware matter effectively apply even to claims subject to exclusive federal jurisdiction, such as CERCLA claims. For example, in *Marsh v. Rosenbloom*, 499 F.3d 165 (2nd Cir. 2007), the 2nd Circuit considered CERCLA claims asserted by the State of New York against the shareholder-distributees of Panex, Industries, Inc. Panex was dissolved under Delaware law, and the State argued that its CERCLA claims should be allowed to proceed

based on several legal doctrines, including that federal common law recognized a trust fund doctrine. The 2nd Circuit ruled that neither CERCLA nor any notion of federal common law preempted Delaware law, and dismissed New York's claims against the shareholder-distributees and Panex. In essence, *Marsh* continued the ongoing trend announced in *United States v. Bestfoods*, 524 U.S. 51 (1998) to have state corporate law apply in CERCLA cases, rather than some notion of federal common law. Moreover, CERCLA's exclusive federal court jurisdiction provision did not prevent Panex's Delaware dissolution from eliminating any CERCLA claims against the dissolved entity or its shareholders-distributees.

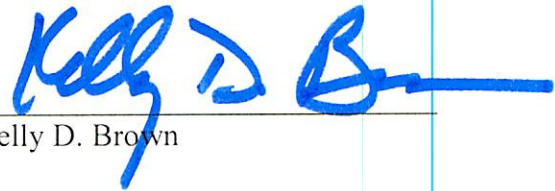
Based on the language of CERCLA and cases interpreting it, including *BNSF* and *NCR*, the United States has no viable claim against IZI; it should allow IZI's dissolution to go forward and take no action to impede the dissolution process.

If you have any questions, please call me 713.752.8628.

Sincerely,

CRAIN CATON & JAMES, P.C.

By:


Kelly D. Brown

KDB/kkd
Enclosures



interamerican
zinc,
inc.

IZI

1415 East Michigan Street
Adrian, Michigan 49221
tel. (517) 263-8984
twx. 510-450-2890

INVOICE	
NUMBER	1-106
DATE	1/19/83

SOLD
TO

SANDOVAL ZINC COMPANY
3649 S. ALBANY AVENUE
CHICAGO, IL 60632

SHIP
TO

SANDOVAL ZINC COMPANY
SMELTER ROAD
SANDOVAL, IL 62882

CUSTOMER ORDER NUMBER	CUSTOMER NUMBER	TERMS	F.O.B.	SHIP VIA		CONTROL NO.
821001		NET 30	SHIPPING POINT	N&W-B&O/N&W51359DF 12/10/82		2620
QUANTITY ORDERED	QUANTITY BACK ORDERED	QUANTITY SHIPPED	DESCRIPTION		UNIT PRICE	NET AMOUNT
1 C/L		151,500# (4,242#) 147,258# X 61.7%	ZINC OXIDE LESS 2.8% MOISTURE ZINC CONTENT CONTAINED ZINC OXIDE		\$10.77/ CWT	\$9,785.41
PAID IN FULL - CHECK #1610						

"Seller represents that with respect to the production of the articles and/or the performance of the services covered by this invoice, it has fully complied with Section 12 (A) of the Fair Labor Standards Act of 1938, as amended."

CUSTOMER ACKNOWLEDGMENT



interamerican
zinc,
inc.

1415 East Michigan Street
Adrian, Michigan 49221
tel.(517)263-8984
twx.510-450-2890

INVOICE	
NUMBER	1-116
DATE	1/31/83

SOLD
TO

SANDOVAL ZINC COMPANY
3649 S. ALBANY AVENUE
CHICAGO, IL 60632

SHIP
TO

SANDOVAL ZINC COMPANY
SMELTER ROAD
SANDOVAL, IL 62882

CUSTOMER ORDER NUMBER	CUSTOMER NUMBER	TERMS	F.O.B.	SHIP VIA		CONTROL NO.	
821001		NET 30	SHIPPING POINT	N&W	12/15/82	2649	
QUANTITY ORDERED	QUANTITY BACK ORDERED	QUANTITY SHIPPED	DESCRIPTION			UNIT PRICE	NET AMOUNT
1 C/L		151,100# (3,475#) 147,625# X 59.2% 87,394#	ZINC OXIDE LESS 2.3% MOISTURE ZINC CONTENT CONTAINED ZINC OXIDES			\$10.77/CWT	\$9,412.33
PAID IN FULL - CHECK #1622							

"Seller represents that with respect to the production of the articles and/or the performance of the services covered by this invoice, it has fully complied with Section 12 (A) of the Fair Labor Standards Act of 1938, as amended."

CUSTOMER ACKNOWLEDGMENT



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inc.

1415 East Michigan Street
Adrian, Michigan 49221
tel. (517) 263-8984
twx. 510-450-2890

INVOICE	
NUMBER	5-123
DATE	5/19/83

SOLD
TO

SANDOVAL ZINC COMPANY
3649 SOUTH ALBANY AVENUE
CHICAGO, IL 60632

SHIP
TO

SANDOVAL ZINC COMPANY
SMELTER ROAD
SANDOVAL, IL 62882

CUSTOMER ORDER NUMBER	CUSTOMER NUMBER	TERMS	F.O.B.	SHIP VIA	CONTROL NO.	
830330		NET 30	SHIPPING POINT	N&W 164140 SHIPPED 4/7/83	2743 ✓	
QUANTITY ORDERED	QUANTITY BACK ORDERED	QUANTITY SHIPPED	DESCRIPTION		UNIT PRICE	NET AMOUNT
1 C/L		149,700# 3,743# 145,957# X 60.1% 87,720#	ZINC OXIDE LESS 2.5% MOISTURE ZINC CONTENT CONTAINED ZINC OXIDE		\$10.64/ CWT	\$9,333.41
PAID IN FULL - CHECK #1808						

"Seller represents that with respect to the production of the articles and/or the performance of the services covered by this invoice, it has fully complied with Section 12 (A) of the Fair Labor Standards Act of 1938, as amended."

CUSTOMER ACKNOWLEDGMENT



interamerican
zinc,
inc.

1415 East Michigan Street
Adrian, Michigan 49221
tel. (517) 263-8984
twx. 510-450-2890

INVOICE	
NUMBER	7-106
DATE	7/11/83

SOLD
TO

SANDOVAL ZINC COMPANY
3649 SOUTH ALBANY AVENUE
CHICAGO, IL 60632

SHIP
TO

SANDOVAL ZINC COMPANY
SMELTER ROAD
SANDOVAL, IL 62882

CUSTOMER ORDER NUMBER	CUSTOMER NUMBER	TERMS	F.O.B.	SHIP VIA	CONTROL NO.	
830330		NET 30	SHIPPING POINT	N&W 161938 5/26/83	2745✓	
QUANTITY ORDERED	QUANTITY BACK ORDERED	QUANTITY SHIPPED	DESCRIPTION		UNIT PRICE	NET AMOUNT
1 C/L		150,500# (3,462#) 147,038# X 57.1%	ZINC OXIDE LESS 2.3% MOISTURE ZINC CONTENT			
		83,959#	CONTAINED ZINC OXIDES		\$10.67/ CWT	\$8,958.43
PAID IN FULL - CHECK #1900						

"Seller represents that with respect to the production of the articles and/or the performance of the services covered by this invoice, it has fully complied with Section 12 (A) of the Fair Labor Standards Act of 1938, as amended."

CUSTOMER ACKNOWLEDGMENT



interamerican
zinc,
inc.

1415 East Michigan Street
Adrian, Michigan 49221
tel.(517) 263-8984
twx.510-450-2890

INVOICE	
NUMBER	4-220
DATE	4/24/84

SOLD
TO

SANDOVAL ZINC COMPANY
3649 S. ALBANY AVENUE
CHICAGO, IL 60622

SHIP
TO

SANDOVAL ZINC COMPANY
SMELTER ROAD
SANDOVAL, IL 62882

CUSTOMER ORDER NUMBER	CUSTOMER NUMBER	TERMS	F.O.B.	SHIP VIA	CONTROL NO.	
840106		NET 30	SHIPPING POINT	N&W 2/16/84	3017✓	
QUANTITY ORDERED	QUANTITY BACK ORDERED	QUANTITY SHIPPED	DESCRIPTION		UNIT PRICE	NET AMOUNT
1 CKL		161,500#	ZINC OXIDE			
		(4,684)	LESS 2.9% MOISTURE			
		156,816				
		X 59.2	ZINC CONTENT			
		92,835#	CONTAINED ZINC @\$14.17/CWT.			\$13,154.72
PAID INFOULL = CHECK #3366.						

"Seller represents that with respect to the production of the articles and/or the performance of the services covered by this invoice, it has fully complied with Section 12 (A) of the Fair Labor Standards Act of 1938, as amended."

CUSTOMER ACKNOWLEDGMENT



interamerican
zinc,
inc.

1415 East Michigan Street
Adrian, Michigan 49221
tel.(517)263-8984
twx.510-450-2890

INVOICE	
NUMBER	2-328
DATE	2/28/85

SOLD
TO

SANDOVAL ZINC COMPANY
3649 SOUTH ALBANY AVENUE
CHICAGO, IL 60622

SHIP
TO

SANDOVAL ZINC COMPANY
SMELTER ROAD
SANDOVAL, IL 62882

CUSTOMER ORDER NUMBER	CUSTOMER NUMBER	TERMS	F.O.B.	SHIP VIA	CONTROL NO.
841018		NET 30	SHIPPING POINT	N&W 1/5/85 PREPAID	3320
QUANTITY ORDERED	QUANTITY BACK ORDERED	QUANTITY SHIPPED	DESCRIPTION		UNIT PRICE
1 C/L		162,760# (4,395#) 158,365# X59.4%	ZINC OXIDE LESS 2.7% MOISTURE ZINC CONTENT CONTAINED ZINC		
			CHECK #4010 RECEIVED IN PAYMENT OF THIS INVOICE.		
					\$15.03/CWT.
					\$14,138.57

"Seller represents that with respect to the production of the articles and/or the performance of the services covered by this invoice, it has fully complied with Section 12 (A) of the Fair Labor Standards Act of 1938, as amended."

CUSTOMER ACKNOWLEDGMENT